

*In the Matter of Thomas Ricchiuti*

DOP Docket No. 2004-4005

**(Merit System Board, decided August 9, 2006)**

The appeal of Thomas Ricchiuti, a County Correction Officer with Monmouth County, of his 10-day suspension, on charges, was heard by Administrative Law Judge (ALJ) Jeff S. Masin, who rendered his initial decision on May 17, 2006. Exceptions were filed on behalf of the appointing authority, and cross-exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on August 9, 2006, accepted and adopted the Findings of Fact and Conclusions of Law as contained in the attached initial decision and the recommendation that the suspension be reversed.

## **DISCUSSION**

The appellant was charged with conduct unbecoming a public employee and failure to cooperate with an investigation of the Monmouth County Prosecutor's Office (Prosecutor's Office). Specifically, the appointing authority asserted that the Prosecutor's Office attempted to interview the appellant on September 29 and September 30, 2003 as a witness to an incident involving an inmate and a fellow officer. On September 29, 2003, it was charged that the appellant was "uncooperative and would not give the interviewing detective any information." On September 30, 2003, the appointing authority alleged that the appellant "refused to cooperate or answer questions despite [his] understanding that [his] participation was as a witness and not as a target." Upon the appellant's timely appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In his initial decision, the ALJ found that the appellant credibly testified regarding his two encounters with members of the Prosecutor's Office. Specifically, the appellant was summoned to the Prosecutor's Office on September 29, 2003 and questioned regarding a statement made by the target of the investigation to a superior officer in relation to the incident under investigation. The appellant initially responded by denying that he had any knowledge of such a statement. After the investigating officer suggested that the appellant start thinking about his family and his future, the appellant stated that he wished to consult with an attorney before continuing the discussion. The ALJ also found that, on September 30, 2003, the appellant was again ordered to report to the Prosecutor's Office for

questioning. Although the appellant appeared with his union representative, his union representative was not permitted to enter the room where the appellant was to be questioned. During the September 30, 2003 meeting, the appellant refused to answer any questions, repeatedly responding that he was invoking his Fifth Amendment rights and would not respond until he had the opportunity to consult with his lawyer. The ALJ noted that the appellant produced his attorney's business card and indicated that he would be meeting with his attorney the next day. While the investigating officer attempted to read the appellant the contents of the Witness Acknowledgment Form, the ALJ found that the appellant refused to respond other than to state that he wished to speak to his attorney. Further, the ALJ found that, during the September 30, 2003 session, the appellant was also advised that he had come "in there as a witness [but he] was leaving as a target." The ALJ also emphasized that, once the appellant had the chance to speak with his attorney, he returned and answered all questions posed to him on October 8, 2004.

Against this backdrop, the ALJ considered the impact of the appellant's refusal to respond to questions and his repeated requests to consult with counsel. Specifically, the Attorney General's Internal Affairs Policy and Procedures (AG Guidelines) generally provide that "[a]n officer's failure to fully cooperate with an administrative investigation and/or an officer's failure to be completely truthful during an administrative interview can form the basis for disciplinary action separate and apart from the allegations under investigation." Further, the AG Guidelines state that:

The courts have decided that a public employer must permit an employee to have a representative present at an investigative interview if the employee requests representation and the employee reasonably believes the interview may result in disciplinary action. *See also N.L.R.B. v. Weingarten, Inc.*, 420 U.S. 251 (1975). However, a representative shall be permitted to be present at the interview of a subject officer whenever he or she requests a representative. While the Sixth Amendment right to counsel does not extend to administrative investigations, an officer shall be permitted to choose an attorney as their representative if he or she so desires.

Additionally, the ALJ noted the similarity between the instant matter and *In the Matter of William Carroll*, 339 N.J. Super. 429 (App. Div. 2001). In *Carroll*, the appellant was disciplined for refusing to answer questions "relevant to an ongoing criminal investigation of which he was not a target" prior to consulting with an attorney. The Appellate Division held that the "right to counsel" granted by the AG Guidelines was violated, and Carroll

could not be disciplined for his failure to cooperate in the investigation. Although the ALJ noted that the appointing authority attempted to distinguish the instant matter by claiming that the appellant was disciplined due to his defiant and disruptive attitude in refusing to answer questions, the ALJ was not persuaded. He determined that:

[T]he real issue here is clearly the refusal of the officer to cooperate by answering the questions posed to him at the time and the place they were presented to him and when the county wanted them answered, and the reason for his refusal was his stated desire to consult with counsel before doing so. Once he had that opportunity, he did speak to the authorities, as indeed Officer Carroll did. *Initial decision* at 17.

Accordingly, the ALJ concluded that, had the appellant's request for counsel been promptly accommodated, he would have cooperated with the investigation from its inception. As such, the ALJ found that the appellant could not be disciplined for his refusal to cooperate, and he recommended dismissal of the charges.

In its exceptions to the ALJ's initial decision, the appointing authority maintains that the instant disciplinary action was based on the employee's attitude. The appointing authority asserts that the appellant was not disciplined for refusing to answer questions; rather, the disciplinary action stemmed from "the manner in which [he] conducted himself" in refusing to answer questions. It emphasizes that the AG Guidelines impose upon the appellant the duty to cooperate with internal investigations, and it claims that he disrespectfully failed to do so. In response, the appellant argues that the appointing authority should not be permitted to retroactively alter the specifications for his disciplinary charges. He maintains that the appointing authority clearly disciplined him based on his failure to respond to questions during an internal investigation.

The Board is not persuaded by the appointing authority's exceptions. As the ALJ found, the AG Guidelines provide that, while law enforcement officers questioned in internal investigations do not enjoy the Sixth Amendment right to counsel, they should be permitted to obtain counsel if they so desire. The AG Guidelines also provide officers with the ability to consult with a union representative or any other representative of his choice and to have the representative present during an interview. Although the appointing authority attempts to characterize the basis of the appellant's disciplinary charges as something other than his failure to answer the questions posed to him, a review of the record in its entirety provides otherwise. The appellant was charged with "failure to cooperate with an

investigation of the Monmouth County Prosecutor's Office." The specifications indicate that the appellant was "uncooperative and would not give the interviewing detective any information." The only "cooperation" that an officer is obligated to provide during such an interview is to reply to the questions posed to him. When an officer's lack of cooperation is based on the exercise of his right to consult with his attorney, *Carroll, supra*, clearly holds that the officer cannot be disciplined for his failure to cooperate in the investigation.

In addition, even if the Board was persuaded that the disciplinary charges at issue were based on the appellant's conduct during the interviews, rather than his failure to respond, it must be emphasized that the ALJ found the appellant credible in his depiction of the two interviews. In this regard, the Board acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999) ). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Board appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Board has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A. 52:14B-10(c); Cavalieri v. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). In this case, upon thorough review, the Board finds that there is nothing in the record evidencing that the ALJ's findings were flawed or were not based on the credible evidence in the record.

Moreover, even if the Board found that the appellant displayed a defiant attitude in asserting his right to counsel, his behavior must be viewed in context. The ALJ found that the appellant credibly testified that the investigators suggested that he "think about his family," remarked that the appellant was "leaving as a target" of the investigation," refused to permit the appellant's union representative to enter the room with him after the suggestion was made that he had become a target of the investigation, and persisted in attempting to question the appellant over two days, despite his repeated requests to consult with his attorney and his assurance that he would cooperate following his consultation. It must be emphasized that the appointing authority makes no claim that the appellant displayed a poor attitude prior to the first instance in which he asserted his right to counsel.

Indeed, the instant matter would not be before the Board had the appellant's request for counsel been honored the first time he asserted it.

Accordingly, the Board agrees with the ALJ's findings and conclusions and dismisses the disciplinary charges against the appellant. As such, the appellant is entitled to back pay and benefits for the period of his suspension. *See N.J.A.C. 4A:2-2.10*. Additionally, since the appellant's disciplinary charges were dismissed, he is entitled to reasonable counsel fees pursuant to *N.J.A.C. 4A:2-2.12*.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Board's decision will not become final until any outstanding issues concerning back pay and/or counsel fees are finally resolved.

## **ORDER**

The Merit System Board finds that the action of the appointing authority in imposing a 10-day suspension was not justified. Therefore, the Board dismisses the charges against the appellant and orders that the appellant be granted back pay, benefits and seniority for 10 days. Additionally, the Board grants counsel fees pursuant to *N.J.A.C. 4A:2-2.12*. Proof of income earned and an affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2-2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and/or counsel fees.

The parties must inform the Board, in writing, if there is any dispute as to back pay and/or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Board will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.